
From: Sullivan, Greg
Sent: Friday, September 8, 2017 3:30 PM
To: Studlien, Susan; LaPosta, Dore; Armstead, John A.; Banister, Beverly; Kemker, Carol; Guerriero, Margaret; Rubini, Suzanne; Arrazola, Ignacio; Eppers, Jim; Vergeront, Julie; Bohan, Suzanne; Thompson, Christopher; daw, harry; Flourney, Karen; Johnson, Kathleen; Kowalski, Ed; McGuire, Karen; Smith, Catherine; Sawyer, William; Swan, Russell; Toney, Anthony; McFadden, Kelly; Matthews, Julie; Barra, Michael; Weekley, Erin; Potts, Mark; Seager, Cheryl; Anderson, Kate; daw, harry; Opekar, Kimberly
Cc: Miles, James; Lott, Don; Brown, Stephanie; Baney, Tony; Presler, Amos; Tierney, Meghan; Price, Michelle; Vizard, Elizabeth; Anderson, Steve
Subject: Extension of the TSCA RRP Micro-business Penalty Pilot and Graduated Penalty Approach
Attachments: LBP GPA Pilot 3-5-17.pdf

Regional TSCA Enforcement and ORC Managers,

This email extends the Region's use of both the Micro-business Penalty Pilot and Graduated Penalty Approach (GPA) Pilots for TSCA RRP cases to **March 31, 2018**. Although the Micro-Business Pilot has been in effect for some time the GPA Pilot is fairly new. The GPA Pilot became effective January 2017, but Regions generally did not begin using it until after March 5, 2017. This extension provides a full year of implementation from the March 5, 2017 memorandum for the Regions to continue to test the GPA Pilot. The extension also provides time to gather information from the Region's experience using the pilots to inform the selection of the better option for the lead-based paint enforcement. Both pilots are available at our new LBP Intranet site:

<http://intranet.epa.gov/oeca/oce/wced/leadbasedpaintreference.html>.

Thank you for your continued feedback on these alternative penalty approaches and for your support for improving the RRP enforcement program. If you have questions, then please feel free to contact Stephanie Brown at brown.stephanie.epa.gov or at 202 564-2596.

Greg

Gregory Sullivan, Director
Waste and Chemical Enforcement Division
U.S. Environmental Protection Agency, OECA, OCE
1200 Pennsylvania Ave, NW (MC2249A)
Washington, DC 20460
202 564-1298

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 05 2017

MEMORANDUM

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

SUBJECT: Pilot Graduated Penalty Approach for TSCA RRP Rule and Abatement Rule Enforcement Settlements

FROM: Gregory Sullivan, Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement

TO: Regions 1-10

This memorandum transmits a pilot Lead-Based Paint Graduated Penalty Approach (“LBP GPA Pilot” or “Pilot”) for addressing eligible businesses under the LBP Consolidated Enforcement Response and Penalty Policy (ERPP).¹ The LBP GPA Pilot is available for settlements that resolve violations of the Renovation, Repair, and Painting (“RRP”) Rule and the Abatement Rule² for cases that are concluded in Fiscal Year 2017. The pilot offers Regions a settlement tool in addition to the Micro-business Penalty Pilot.³ The effective date of the LBP GPA Pilot is January 10, 2017. Regions may use the pilot but are not required to.

The LBP GPA Pilot provides case teams the option of applying a multiplier to penalty calculations that reduces the gravity-based penalty otherwise imposed under the ERPP, as explained below.⁴ The Pilot is available where a respondent has a pre-tax (unadjusted) gross annual revenue (GAR) of \$2,000,000 or less, or a net worth of \$600,000 or less. The Pilot adopts the graduated penalty approach in Appendix X of the 1994 Clean Air Act (CAA) Civil Penalty Policy,⁵ adjusted for inflation as discussed below. The CAA penalty policy and RRP/Abatement Rules deal with comparable respondents in terms of business size, such as plumbing and heating, ventilation, and air conditioning (HVAC) contractors. The CAA’s scaled approach provides an alternative to the category-based penalty matrices in the Micro-business Penalty Pilot.

¹ Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule (LBP Consolidated ERPP) (August 2010), <http://www.epa.gov/compliance/resources/policies/civil/penalty/leadbasedpaint-consolidatederpp0810>.

² 40 C.F.R. Part 745, Subparts E and L, respectively.

³ Memorandum, Rosemarie A. Kelley, Director, WCED/OCE/OECA, Pilot RRP Penalty Program for Micro-businesses (May 3, 2012)(Micro-business Penalty Pilot). Like the Micro-business Penalty Pilot, the LBP GPA Pilot uses pre-tax dollars and does not apply to training provider cases.

⁴ The multiplier is a fraction representing the ratio between the respondent’s finances versus the maximum amount allowed under the pilot. E.g., if the respondent’s GAR is \$500,000, then the multiplier is 0.25 (\$500,000 is 25% of the pilot’s \$2,000,000 maximum GAR), so that the penalty is reduced to 25% of the ERPP amount.

⁵ Appendix X Clean Air Act Civil Penalty Policy for Violations of 40 CFR Part 82, Subpart F: Maintenance, Service, Repair, and Disposal of Appliances Containing Refrigerant (Appendix X) (June 1, 1994).

Inflation Adjustment to the CAA's Approach for the Lead-based Paint GPA Pilot

The CAA policy is dated June 1, 1994. The LBP GPA Pilot adjusts the maximum amounts allowed for a respondent's gross annual revenue or net worth for inflation. The Consumer Price Index Inflator from 1994 to 2016 is a factor of 1.7. Rounding up the inflation factor, the LBP GPA Pilot doubles the maximum allowable gross annual revenue and net worth used in the 1994 CAA policy. The LBP GPA Pilot is available for respondents with *up to* \$2,000,000 in GAR or \$600,000 in net worth (rather than up to \$1,000,000 GAR or \$300,000 net worth allowed under the 1994 CAA policy).

Formula for Determining the LBP GPA Penalty

Determine the LBP GPA penalty as follows:

- Identify the ERPP gravity-based penalty for the violation.
- Then, determine the Pilot's multiplier. If using gross annual revenue documentation, then divide the respondent's gross annual revenue by \$2,000,000 (the Pilot's maximum GAR), *or* if using net worth documentation, then divide the respondent's net worth by \$600,000 (the Pilot's maximum net worth). The resulting quotient is the LBP GPA's multiplier.
- Then apply the pilot's multiplier to reduce the ERPP penalty: multiply the ERPP penalty (from Step 1) by the GPA multiplier (from Step 2). The resulting product is the LBP GPA penalty.

Attachment 1 provides illustrations, along with a comparison to the penalty available under the Micro-business Penalty Pilot.

Other Considerations

The LBP GPA Pilot modifies only the ERPP's gravity-based penalty. Therefore, an LBP GPA penalty should be determined before any adjustments for mitigating or aggravating factors under the ERPP. If the LBP GPA penalty exceeds the statutory maximum penalty, then the statutory maximum applies. The Region may exercise discretion in determining whether to use the LBP GPA Pilot or the Micro-Business Penalty Pilot, or neither. In making this selection, the case team is encouraged to consider the extent, nature and reliability of the documentation used to support the significant penalty reduction available under the Pilot; and may consider the nature of the violation and other appropriate factors. Attachment 2 compares the LBP GPA Pilot versus the Micro-business Penalty Pilot.

Financial Documentation

To ensure transparency, accuracy and fairness in implementing the LBP GPA Pilot, the case file needs to include adequate documentation confirming the respondent's eligibility for the penalty reduction under the Pilot. The Region should use the following, in order of preference: (1) the respondent's federal income tax filing⁶; (2) the respondent's actual financial records, such as sales

⁶ Gross revenue is calculated as *gross sales/receipts* minus *returns and allowances*. Gross revenue is reported on federal taxes at Form 1120, Line 1, or at Form 1040, Schedule C, Line 3. Net worth is calculated as *total assets* minus *total liabilities*. Total assets and total liabilities are reported on Form 1120, Schedule L. Regions should calculate net worth as that figure is not calculated for federal income tax purposes.

and balance sheets; or (3) publicly-available sales, revenue and/or income documentation, such as reports from Dun & Bradstreet or American Business Directory. Alternatively, the Region may use a certified statement provided by the respondent's certified public accountant which attests to the respondent's financial situation.⁷ The documentation should cover at least the most recent two (2) full years of business operation, but documentation covering only the most recent year of operation may be acceptable in appropriate circumstances.

Duration of the Pilot; Information

The LBP GPA Pilot is available for cases concluded by September 30, 2017. OECA intends to review the pilot to determine whether to continue it, with or without revision. Therefore, Regions are asked to record, in the settlement instrument or otherwise, when a settlement incorporates the LBP GPA Pilot (or the Micro-business Penalty Pilot).

Contacts

Comments and question may be directed to Stephanie Brown, brown.stephanie@epa.gov.

Attachments:

Attachment 1: Hypothetical Illustrations

Attachment 2: *LBP GPA Pilot versus Micro-business Penalty Pilot*

⁷ Where no verifiable information is available, the Region may accept a self-certification in which the respondent describes its financial situation at risk of penalty under 18 U.S.C. § 1001. Also, Regions are encouraged to include in any settlement agreement an appropriate certification by which the respondent attests to the truth and completeness of financial information that it supplied to EPA at risk of penalty under 18 U.S.C. § 1001 and potential nullification of the penalty reduction.

Figure 1 – Hypothetical Illustrations

FACTUAL BACKGROUND:	
Violation: Failure of a firm that performs, offers or claims to perform renovations or dust sampling for compensation to obtain initial certification from EPA, under 40 CFR §749.89 (a) pursuant to 40 CFR §745.81 (a)(2)(ii). Level 3a violation. ERPP Penalty: \$15,300, assuming a Significant Extent level.	
LBP GPA	Micro-business (MB) Pilot
Scenario #1. Gross Annual Revenue (GAR) is \$100,000.	
Step 1: ERPP penalty @ \$15,300. Step 2: $\$100,000 \text{ (GAR)} \div \$2,000,000 \text{ (Pilot's GAR limit)} = 0.05 \text{ (Multiplier)}$. Step 3: $\$15,300 \text{ (ERPP Penalty)} \times 0.05 \text{ (Multiplier)} = \765 . The LBP GPA penalty is \$765.	Step 1: ERPP penalty @ \$15,300. Step 2: \$100,000 (GAR) meets MB Pilot eligibility for respondent with $\leq \$100,000$ in annual sales The Micro-business penalty would be \$900.
Scenario #2. Gross Annual Revenue (GAR) is \$299,000.	
Step 1: ERPP penalty @ \$15,300. Step 2: $\$299,000 \text{ (GAR)} \div \$2,000,000 \text{ (Pilot's GAR limit)} = 0.1495 \text{ (Multiplier)}$. Step 3: $\$15,300 \text{ (ERPP Penalty)} \times 0.1495 \text{ (Multiplier)} = \$2,287.35$. The LBP GPA penalty is \$2,287.35.	Step 1: ERPP penalty @ \$15,300. Step 2: \$299,000 (GAR) meets eligibility from MB Pilot for respondent with annual sales between \$100,001 and \$300,000. The Micro-business penalty would be \$2,040.
Scenario #3. Gross Annual Revenue (GAR) is \$301,000.	
Step 1: ERPP penalty @ \$15,300. Step 2: $\$301,000 \text{ (GAR)} \div \$2,000,000 \text{ (Pilot's GAR limit)} = 0.1505 \text{ (Multiplier)}$. Step 3: $\$15,300 \text{ (ERPP Penalty)} \times 0.1505 \text{ (Multiplier)} = \$2,302.65$. The LBP GPA penalty is \$2,302.65.	Step 1: ERPP penalty @ \$15,300. Step 2: \$301,000 (GAR) does <u>not</u> meet eligibility requirements for the Micro-business Pilot. The MB Pilot is <u>not</u> available since the GAR exceeds \$300,000.
Scenario #4. Net worth is \$450,000.	
Step 1: ERPP penalty @ \$15,300. Step 2: $\$450,000 \text{ (Net Worth)} \div \$600,000 \text{ (Pilot's Net Worth limit)} = 0.75 \text{ (Multiplier)}$. Step 3: $\$15,300 \text{ (ERPP Penalty)} \times 0.75 \text{ (Multiplier)} = \$11,475$. The LBP GPA penalty is \$11,475.	Step 1: ERPP penalty @ \$15,300. Step 2: \$450,000 (Net Worth) does <u>not</u> meet eligibility requirements for the MB Pilot. The MB Pilot is <u>not</u> available since it does not consider net worth.

Attachment 2

LBP GPA Pilot versus Micro-Business Penalty Pilot

	Graduated Penalty Approach (GPA) Pilot	Micro-business (MB) Penalty Pilot
Effective Date	Jan. 10, 2017	May 3, 2012
Pilot End Date	TBD	TBD
Deadline for Concluding Case (*Subject to possible extension)	September 30, 2017 *	September 30, 2017 *
Deadline for Initial Contact with Respondent	None	None
Eligible Violations	RRP Rule or Abatement Rule (any violation, <i>except</i> training provider violations)	RRP Rule or Abatement Rule (any violation, <i>except</i> training provider violations)
Approach to Penalty Reduction	Graduated approach (based on applying a multiplier derived by comparing respondent's finances to the pilot's maximum allowed amount)	Flat Rate (based on categorical matrices)
Penalty Affected	Pilot reduces ERPP gravity-based penalty – which can then be adjusted using ERPP adjustment factors.	Pilot reduces ERPP gravity-based penalty – which can then be adjusted using ERPP adjustment factors.
Financial Measure(s) Analyzed	Gross Annual Revenue (pre-tax) or Net worth	Gross Annual Revenue (pre-tax) (stated as “annual sales or gross pre- tax revenue” or “annual [pre-adjusted] gross income”) (Net worth is <u>not</u> considered.)
Eligibility Maximum	\$2,000,000 gross annual revenue (pre- tax) – or \$600,000 net worth	\$300,000 gross annual revenue (pre- tax)
Appropriate Documentation	Sufficient documentation as specified in the Pilot	Sufficient documentation as specified in the Pilot